



WILLIAM J. LEAHY  
CHIEF COUNSEL

*The Commonwealth of Massachusetts*  
*Committee for Public Counsel Services*  
*44 Bromfield Street, Boston, MA 02108*

TEL: (617) 482-6212  
FAX: (617) 988-8495

PATRICIA A. WYNN  
DEPUTY CHIEF COUNSEL  
PRIVATE COUNSEL DIVISION

ANDREW SILVERMAN  
DEPUTY CHIEF COUNSEL  
PUBLIC DEFENDER DIVISION

WRITER'S DIRECT DIAL NUMBER

FY04 Report to the Legislature  
on the Committee for Public Counsel Services

Herewith is the report submitted by the Committee for Public Counsel Services (CPCS) in response to the questions presented in line item 0321-1500 in the fiscal year 2004 budget:

(a) The Number Of Clients Assisted By The Committee In The Prior Fiscal Year:

During fiscal year 2003, CPCS provided legal representation to indigent or partially indigent clients in 239,503 cases. In addition, CPCS provided representation to 14,734 clients for purposes of bail only, and to 2,561 clients for representation at bail petition hearings. These activities bring the number of CPCS assignments in FY03 to a total of 256,798.

(b) Any Proposed Expansion Of Legal Services Delineated By Type Of Service, Target Population, And Cost:

CPCS legal representation is available only to those persons who are **guaranteed the right to counsel** by constitutional provision, statute, or rule of court **and** who have been determined to be financially eligible for publicly-funded counsel through the application of Supreme Judicial Court Rule 3:10.

CPCS has not sought to expand the scope of the legal services it provides. Indeed, by its repeated proposals for stricter scrutiny of indigency determinations, by its active participation on the Trial Court's Commission on Indigency Verification, and by its persistent advocacy for reform of the Civil Infraction statute, G.L. c.277, §70C, CPCS has aggressively sought to limit the frequency of its assignments. **Please note:** in its FY05 budget proposal, CPCS has once again sought to control the frequency of counsel assignments, and hence the cost of counsel, by proposing three critical fiscal reforms:

- 1) a real-time Indigency Verification process, modeled after the system which has proven to be effective in Oregon
- 2) required annual review of all indigency determinations
- 3) allowing judges to treat minor misdemeanor offenses as civil infractions

It is our hope that the General Court will pass, and the Governor will approve, each of these fiscal reforms.

While CPCS has sought no expansion of its services, the scope and the cost of those services has been expanded many times by the enactment or the amending of statutes which either create or increase counsel costs. For example, the 1996 enactment and 1999 amending of the Sex Offender Registration statute creates a right to counsel for some 20,000 individuals at both the administrative and judicial levels. This has become a rapidly increasing source of new cases; and the appellate litigation which has ensued requires the full-time attention of two CPCS staff attorneys. For years, CPCS has proposed a much shorter "reach-back" provision than under current law; which requires registration even by people whose last or only sexual offense may have occurred thirty or more years ago. To date, this fiscal reform has not been enacted. Indeed, new proposals would, if enacted, increase costs further by imposing additional restrictions.

For another example, the 1999 enactment of a new Sexually Dangerous Persons commitment law, G.L. c.123A, §§12-16, which authorizes lifetime commitments and requires the assignment of counsel and the payment of expert witnesses, has become a very expensive cost center for CPCS, yet has been unaccompanied by any increase in staff. In fact, CPCS attorney staff has dramatically decreased in recent years, due to annual reductions in the portion of its appropriation which has been allocated for staff hiring.

A third example is that, apparently due to a more aggressive approach by probation officers, the number of Probation Surrender assignments has increased dramatically in recent years. Indeed, for the most recent five-year period, the increase in CPCS spending in this area has been exceeded only by the increase in Care and Protection case costs.

(c) The Total Number Of Persons Who Received Legal Services By [CPCS], By Type Of Case And Geographic Location:

(1) Of the 239,503 assignments in which CPCS provided case representation, i.e., excluding assignments for bail only and for bail petitions, 197,015 (82.3%) were criminal or juvenile delinquency cases. (The 137,370 District Court cases accounted for almost 70% of CPCS criminal case representation.) Civil cases numbered 42,488, and comprised 17.7% of CPCS case assignments. On the civil side, Care and Protection cases numbered 21,462, or about half of the total caseload. Mental Health cases (over 11,000) and Children in Need of Services cases (over 7,500) comprised much of the remaining civil caseload.

(2) The breakout of cases by county in FY03 was as follows:

Suffolk	46,734	19.5% of state total
Middlesex	34,889	14.6%
Essex	28,542	11.9%
Worcester	26,437	11%
Hampden	26,001	10.9%
Bristol	22,798	9.5%

Plymouth	17,510	7.3%
Norfolk	15,271	6.4%
Barnstable	7,322	3%
Hampshire	5,425	2.3%
Berkshire	5,279	2.2%
Franklin	3,007	1.3%
Dukes/Nantucket	288	0.1%

STATE TOTAL: 239,503 100%

(d) The Costs For Services Rendered Per Client, By Type Of Case And Geographic Location:

- (1) The average cost of legal representation in a CPCS case in FY03 was \$368.17. In addition to attorney compensation, this cost includes the expense of training, certification, assignment, performance oversight, bill payment and auditing for private attorneys; and office space, equipment, supplies, secretarial and investigator support, training and supervision for CPCS staff attorneys. It does not include the cost of indigent party expenses approved by a judge, and paid from a separate CPCS line item.

The average cost of providing legal representation in a criminal case in FY03 was \$297.96. The average cost of providing representation in a civil case was \$693.75.

The cost breakout by county was as follows:

<u>County</u>	<u>Total Cost</u>	<u>% of State Cost</u>	<u>Avg. Cost Per Case</u>
Suffolk	\$19,624,167	22.2%	\$419.91
Middlesex	\$13,458,871	15.3%	\$385.76
Essex	\$10,329,526	11.7%	\$361.91
Hampden	\$ 9,308,710	10.6%	\$358.01
Worcester	\$ 8,118,012	9.2%	\$307.07
Bristol	\$ 7,275,137	8.2%	\$319.11
Plymouth	\$ 6,337,285	7.2%	\$361.92
Norfolk	\$ 5,457,953	6.2%	\$357.41
Barnstable	\$ 2,844,077	3.2%	\$388.43
Hampshire	\$ 2,616,245	3.0%	\$482.26
Berkshire	\$ 1,730,155	2.0%	\$327.74
Franklin	\$ 969,547	1.1%	\$322.43
Dukes/Nantucket	\$ 108,482	0.1%	\$376.67

Total Cost: \$88,178,167

Average Cost: \$368.17

(e) The Amount Paid, If Any, To The Committee By Clients For Services Rendered By Type Of Case And Geographic Location:

CPCS received no funds from clients for services which it provided during FY03. However, clients paid \$5,358,260 in counsel fees during FY03, which was deposited in the Commonwealth's General Fund. Of this amount, \$1,989,275 was paid by clients who were determined by a judge to be partially indigent under Supreme Judicial Court Rule 3:10, and \$3,368,985 was paid by clients who, while declared indigent, were ruled able to afford a \$150 legal counsel fee. Consistent with the findings we reported last year, considerable disparity among courts in their counsel fee collections continues to appear in FY03 data. For example, 97.5% of all counsel fees were collected by the District and Boston Municipal Courts, which courts account for fewer than 60% of non-bail CPCS assignments.

(f) The Average Cost For Services Rendered By Said Committee By Type Of Case:

As reported above at (d) (2), the average cost of representation in a criminal case in FY03 was \$297.96, and in a civil case \$693.75. The costs for some of the more prominent types of cases are as follows:

District Court Criminal:	\$ 210.36	CHINS:	\$ 209.17
Care and Protection:	\$ 910.89	Juvenile Delinquency:	\$ 213.82
Superior Court Criminal:	\$ 873.69	Mental Health Commitment:	\$ 279.36
SDP Commitment:	\$1,872.43	Rogers Petition:	\$ 350.78
Sex Offender Registry:	\$ 793.55	Murder (Trial Court)	\$3,790.97
		Murder (Appellate Court)	\$4,395.10

(g) The Average Number Of Hours Spent Per Attorney Per Type Of Case:

The average number of hours billed by private counsel in FY03 was nine hours per case. The average for criminal cases was 7.5 hours, and the average for civil cases was 15.8 hours.

(h) The Feasibility Of The Implementation Of A Flat Rate Compensation System Based On The Type Of Case:

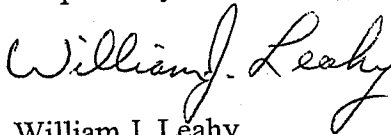
For all the many reasons cited in our response to this question in last year's report, a flat rate system of compensation is not feasible. Moreover, its implementation would violate the constitutional right to counsel, by establishing a financial disincentive for thorough investigation and preparation by assigned counsel, as recognized by the 1986 statewide evaluation which resulted in the establishment of an hourly payment compensation system in Massachusetts.

In 2004, the Administration has abandoned last year's simple flat-rate proposal, in favor of a more cumbersome proposal which mimics the flat-rate proposal in that it does not compensate attorneys for the thorough case investigation and preparation which is the hallmark of competent representation. This year's proposal, a "Retainer-Based" system, compounds this flat rate vice, by adding an inefficient and fiscally irresponsible payment mechanism which

mandates the issuance of \$25 million dollars (in \$10,000 retainers to each of 2,500 attorneys) on the first day of the fiscal year, requires attorneys to send CPCS proof of work to justify every withdrawal from their retainer accounts, and requires each attorney to return unearned amounts to CPCS on the last day of the fiscal year (if they fail to do so, CPCS is expected to utilize the Board of Bar Overseers in some fashion, or "institute civil proceedings" against the attorneys). A more detailed refutation of the changes proposed by H.1 is contained in the attached article in the February 16, 2004, edition of *Massachusetts Lawyers Weekly*, "Better Pay For Bar Advocates': A Rejoinder."

We reiterate last year's message that the major inadequacy in the Massachusetts system for providing counsel for the poor pursuant to Gideon v. Wainwright, 372 U. S. 335 (1963) and successor cases and statutes, is the unacceptably low levels of compensation which are paid to assigned private counsel and CPCS staff attorneys. Meaningful increases in the hourly rates paid to private counsel, and the salaries paid to staff attorneys, are fully justified and long overdue. The outpouring of legislative support for H.4321, which would raise private counsel rates to at least \$60 per hour, has given hope that this need is finally being recognized. In addition, while the funding proposed in H.1 is wholly inadequate, we applaud the Governor's recognition in outside budget section 298 that both assigned private counsel and CPCS staff attorneys are significantly underpaid.

Respectfully submitted:



William J. Leahy  
Chief Counsel

Dated: March 8, 2004